No. 552

In the Supreme Court of the United States

OCTOBER TERM, 1950

CROWN CAFE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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v.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (S. R. 16–24)[1] is reported at 238 F. (2d) 263. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 58–73) are reported at 42 N. L. R. B. 1160.

[1] The printed record for purposes of the petition for a writ of certiorari consists of the printed "transcript of record" in the court below, referred to herein by the designation of "R."; the appendices filed by the petitioner and the Board in the court below, referred to herein by the designations "P. A." and "B. A.," respectively; and the printed proceedings in the court below, referred to herein by the designation "S. R."

JURISDICTION

The decree of the court below (S. R. 35–37) was entered November 22, 1943. The petition for a writ of certiorari was filed December 20, 1943. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's findings that petitioner engaged in unfair labor practices in violation of Section 8 (1), (3), and (5) of the Act are supported by substantial evidence.

2. Whether, upon finding that employees who testified they no longer desired the union to represent them were motivated by fear of petitioner's antiunion threats, the Board acted properly in disregarding such defections for the purpose of determining whether the union had been designated by a majority of the employees, in holding that the union still remained the designated representative, and in ordering petitioner to bargain with it.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 11–12.

STATEMENT

Upon the usual proceedings, the Board, on July 31, 1942, issued its findings of fact, conclusions of law, and order (R. 58–73). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:[2]

In October 1940, two employees at petitioner's Nebraska City plant, Armstrong and Braye, on behalf of some of their fellow workers, undertook to form a local of the American Federation of Labor (R. 59; B. A. 6, 14). By October 7, 1940, 11 of the 13 employees in an appropriate bargaining unit had signed a petition appointing the American Federation of Labor their bargaining agent for 1 year and requesting the issuance of a union charter (R. 59–60; B. A. 42). The charter was in fact issued about a week later (R. 59; B. A. 6, 17).

On October 14, 1940, the union representative sent a letter by registered mail to the superintendent of petitioner's Nebraska City plant, informing petitioner that a majority of the employees had designated the Union as their bargaining agent (R. 61–62; B. A. 5, 43). The letter asked whether petitioner would recognize the Union and stressed the Union's desire for a bar-

[2] In the following statement, references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

gaining conference "at the earliest mutually agreeable date," suggesting that petitioner set a conference date "by return mail" (*ibid.*). Petitioner never answered this letter (R. 62; B. A. 6, 35).

On October 16, after receiving the Union's letter, the superintendent called the employees together for a conference in his office (R. 62–65; B. A. 17, 30, 37). When the men had assembled the superintendent reproached them for having joined the Union, saying: "I don't know what I ever done for you guys to do a thing like this to me" (R. 63–64; B. A. 18, 36–37, 38). He urged the employees to tell him what they had "against him" (R. 63; B. A. 18), and asked Braye and Armstrong what he had done to them that caused them to join the Union (R. 63; B. A. 18, 36–37, 38). Both men assured the superintendent they had nothing against him personally but admitted that they had helped to organize the Union (R. 63; B. A. 18). On hearing this, the superintendent said, "If you boys insist on pushing this organization" the plant "will fold up," since the Nebraska City plant was "just a drop in the bucket" in relation to petitioner's other plants (R. 63; B. A. 18, 30, 40). Before the meeting ended, the superintendent said to the assembled employees: "If it is a wage increase you want, I will see what I can do about it" (R. 64; B. A. 18,

37). Four days later, a general wage increase was put into effect (R. 65; B. A. 18, 37).

The Board concluded that by ignoring the Union's request for recognition and by engaging in antiunion conduct clearly indicative of a disposition not to recognize and deal with the Union, petitioner had failed in its duty to bargain collectively with the Union, thereby violating Section 8 (5) and (1) of the Act (R. 67); further, that by its superintendent's statements and conduct at the meeting of October 16, 1940, petitioner interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 67).

Gordon Armstrong was hired by petitioner in April 1940 as a "forker" (R. 67; B. A. 12)[3] and was one of petitioner's three oldest employees (R. 68; B. A. 34). He was the leader in the movement to organize the Union, having suggested its formation and solicited his fellow workers to sign the petition designating the Union as their bargaining agent (R. 59, 68; B. A. 15, 13, 29). Armstrong's union sympathies came sharply to petitioner's notice on October 16, 1940, when he admitted to the superintendent his role in organizing the Union (R. 63;

[3] The duties of a "forker" are to remove cans from a conveyor belt and place them in storage bins (R. 67; B. A. 34–35).

B. A. 18), an admission which evoked the superintendent's warning that the plant would be shut down if the employees persisted in "pushing" the Union (R. 63; B. A. 18, 30).

Armstrong was laid off on November 30, 1940, allegedly for a "week or so" (R. 67–68; B. A. 21). Two forkers who were not union members and were junior in point of service were retained (R. 68; B. A. 23). Petitioner contended that Armstrong was laid off because he was the least efficient of petitioner's employees. This contention was clearly untrue, not only because his work had been commended (R. 68; B. A. 20) but also because petitioner's employment record rated Armstrong "good" both as to "skill" and "production" (R. 68; B. A. 41). Petitioner's explanation for its failure to reinstate Armstrong, moreover, was groundless and not the motivating cause (R. 68–69; B. A. 13, 27). The real reason for petitioner's refusal to reinstate Armstrong was petitioner's "fear that he would continue his union activities among its employees" if reemployed (R. 69).

The Board concluded that by the foregoing acts petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act (R. 71).

During the hearing five of the eleven employees[4] who had joined the Union testified that they no

[4] Another one of these employees left petitioner's employ prior to the refusal to bargain (R. 60).

longer desired it to represent them for purposes of collective bargaining (R. 61; P. A. 22, 26, 27, 30, B. A. 28). However, the evidence shows, and the Board found, that while they dropped the union subsequent to Armstrong's discharge because they feared they would lose their jobs, they again, almost a year later, decided to make another try at securing collective bargaining through the Union but were again dissuaded because of fear "they would lose their jobs" (R. 61, 65–66, 67; B. A. 7–8, 23–26, 33, 38). Upon this evidence the Board held that "their defection cannot operate to change the status of the Union as the representative of a majority of the employees within the appropriate unit" and that the Union at all times since October 16, 1940, has been the exclusive representative of petitioner's employees (R. 61, 67).

The Board ordered petitioner to cease and desist from its unfair labor practices; upon request, to bargain collectively with the Union; to reinstate Armstrong with back pay; and to post appropriate notices (R. 71–73). Thereafter, the Board filed a petition for enforcement of its order in the court below (S. R. 1–4). On October 25, 1943, the court handed down its opinion enforcing the Board's order in full (S. R. 16–24). A petition for rehearing was denied on November 9, 1943 (S. R. 35), and on November 22, 1943, the court entered its enforcement decree (S. R. 35–37).

ARGUMENT

The petition for certiorari is largely devoted (Pet. 1–6, 9–15) to an attack upon the Board's findings as not supported by substantial evidence. In its statement of the facts (Pet. 9, 24) petitioner omits most of the important evidentiary findings upon which the Board based its ultimate determination that petitioner had engaged in unfair labor practices. The findings of the Board, set forth in our Statement, are amply supported by the evidence we have cited (*supra*, pp. 3–7), as the court below, after review and analysis of the record, held. No question of importance is presented by petitioner's contention that the Board's findings are not supported by substantial evidence, and further review by this Court is not warranted.

Petitioner's contention (Pet. 13–14) that it did not fail in its bargaining obligation because the Union never submitted proof of its majority is without merit. Petitioner made no inquiry as to whether the Union represented a majority of its employees at the time of the request for negotiations, and it did not base its refusal to negotiate upon any claim of lack of majority in the Union. Since the Union, as the Board found (R. 61), had been designated by a majority of the employees in an appropriate unit at the time it requested negotiations, petitioner could not excuse its refusal to bargain by urging before the

Board asserted doubts as to the majority, which had not been the real reason for its refusal to bargain.[5]

Petitioner also contends (Pet. 15–16) that the Board's order requiring it, upon request, to bargain collectively with the Union should not be enforced, because the Union, due to a change in the sentiment of some of its employees, had lost its majority at the time of the hearing. But the Board found (R. 61, 67), on ample evidence (*supra*, p. 7), that the defections from the Union were not the free choice of the employees but solely the result of their fear of petitioner's anti-union conduct. Hence, the defections did not operate to alter the status of the Union as the statutory representative (R. 61, 67). The employees who designated the Union still constitute a majority of the unit, and, therefore, petitioner must fulfill its bargaining obligation. The case thus differs in material respects from *Franks Bros. Company* v. *National Labor Relations*

[5] *National Labor Relations Board* v. *Wm. Tehel Bottling Co.*, 129 F. (2d) 250, 254 (C. C. A. 8); *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 436 (C. C. A. 7); *National Labor Relations Board* v. *Moltrup Steel Products Co.*, 121 F. (2d) 612, 618 (C. C. A. 3); *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. (2d) 681, 688 (C. C. A. 1); *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F. (2d) 756, 757 (C. C. A. 2); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 869 (C. C. A. 2), certiorari denied, 304 U. S. 576.

Board, No. 521, this Term, certiorari granted January 10, 1944, and is clearly governed by the Court's decision in *National Labor Relations Board* v. *Bradford Dyeing Assn.,* 310 U. S. 318, 340.

CONCLUSION

The decision below, sustaining the Board's order, is correct and presents no conflict of decisions or question of general importance. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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